STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKLIN SIERRA-OLIVA, a/k/a FRANCKLIN SIERRA-OLIVA,

Defendant-Appellant.

UNPUBLISHED
April 29, 2004

No. 245846
Kent Circuit Court
LC No. 02-003786-FC

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction following a jury trial of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and CSC III, MCL 750.520d. Defendant was sentenced to concurrent terms of 10 to 50 years' imprisonment for CSC I and 7½ to 15 years' imprisonment for CSC III. We affirm.

Defendant argues the trial court abused its discretion by refusing to give an instruction on assault and battery where it was disputed how many sexual penetrations took place and whether the use of force was related to the sexual penetrations. We disagree.

The determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). Unpreserved error regarding jury instructions is reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 766-768; 597 NW2d 130 (1999).

The court determined assault and battery could be an appropriate lesser-included offense of CSC I, MCL 750.520b, and CSC III, MCL 750.520d, in certain circumstances. However, the court stated that where sexual penetrations followed the application of physical force, assault and battery was not an appropriate jury instruction.

An instruction on a necessarily included lesser offense should be given when requested where a rational view of the evidence would support giving the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). An offense is a necessarily included lesser offense where the greater offense includes all the elements needed to prove the lesser offense. *Id*. at 345, quoting *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975); also *Cornell*, *supra* at

361 ("It is impossible to commit the greater offense without first committing the lesser offense.").

Assuming, arguendo, that assault and battery can be a necessarily included lesser offense of CSC I and CSC III, we conclude that any error arising from the trial court's refusal to instruct on assault and battery was harmless beyond a reasonable doubt. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The issue at trial was whether the sexual penetrations were forcibly accomplished. Defendant admitted that he penetrated the victim, but he disputed the number of penetrations that occurred and whether force was used to accomplish the admitted penetrations; he did, however, admit striking the victim before they had sexual relations. Given this admission, it is clear that the jury, in concluding that defendant used force to commit two admitted sexual penetrations (amounting to CSC I and CSC III), could not rationally have determined that he was guilty only of assault and battery. It is evident that the jury accepted the victim's testimony that defendant beat her in order to coerce sexual relations and rejected his claim that his admitted beating of the victim was an incident separate and apart from their subsequent consensual relations. This jury determination is inconsistent with a finding that defendant committed assault and battery, but then had consensual sexual relations with the victim. Therefore, defendant has failed to establish that it is more likely than not that the outcome would have been different if the assault and battery instruction had been given. *Lukity, supra*.

Defendant also argues that an instruction for CSC II should have been given. The forfeited error rule puts the burden on defendant to show this was clear or obvious plain error and that it affected the outcome of the proceeding. *Carines, supra* at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). CSC II requires sexual contact while CSC I requires sexual penetration. MCL 750.520c; MCL 750.520b. Assuming arguendo that CSC II is a necessarily included lesser offense of CSC I, a jury instruction for CSC II as a lesser-included offense of CSC I must be clearly supported by the evidence. *Cornell, supra* at 367. However, defendant admitted that penetration took place. Thus, the evidence could not support a conclusion that sexual contact occurred but sexual penetration did not. Therefore, the court's failure to instruct on CSC II, sua sponte, was not plain error, did not affect the outcome of the trial, and does not warrant appellate review.

Affirmed.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens